Supreme Court, U.S.
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No. 98-1193

In The Supreme Court of the United States

October Term, 1998

TOM SNYDER,

Petitioner,

vs.

MURRAY CITY CORPORATION, a municipal corporation, and H. CRAIG HALL, City Attorney,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a person has expressed his intention to proselytize and to disparage the beliefs of others by a "prayer" during the opening ceremony of a city council meeting, does a city violate the Establishment Clause by declining to invite him to offer that prayer?

LIST OF PARTIES

The United States intervened in this case in the district court solely to defend the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA") in which Mr. Snyder had based one of his claims. The district court granted summary judgment to defendants and did not reach Mr. Snyder's claim under RFRA or the defense that RFRA was unconstitutional. The United States did not participate in the initial appeal, did not participate in the *en banc* rehearing, and is not a party to this appeal.

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CITATION OF OPINIONS

Snyder v. Murray City Corp., 902 F. Supp. 1444 (D. Utah 1995) ("*Snyder I*") (reproduced at Petitioner's Appendix, beginning page 56a); *Snyder v. Murray City Corp.*, 902 F. Supp. 1455 (D. Utah 1995) ("*Snyder II*") (reproduced at Petitioner's Appendix, beginning page 79a); *Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) ("*Snyder III*") (reproduced at Petitioner's Appendix, beginning page 87a); and, *Snyder v. Murray City Corp.*, No. 96-4087 (10th Cir. Oct. 27, 1998) (*en banc*) ("*Snyder IV*") (reproduced at Petitioner's Appendix, beginning page 1a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

First Amendment, United States Constitution: "Congress shall make no law respecting an establishment of religion . . . ."

Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), the Utah Supreme Court held that the Utah Constitution did not prohibit a city council from opening its meetings with a prayer. The plaintiff there challenged the tradition on state constitutional grounds only. During the pendency of *Whitehead*, Murray City (the "City") suspended its tradition of opening its council meetings with a prayer. *Snyder IV*, Appendix at 3a.[1]

After *Whitehead* was decided, the City resumed its tradition which it had otherwise long maintained. Prayers were offered by members of religious communities in and around the City, including various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans. Each person who

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[1] All citations to the record reference the decisions that are reproduced in Petitioner's Appendix.

offered a prayer did so at the initial request of the City Council, usually in response to a form letter the Council had circulated to local religious organizations. Prior to the events at issue in this case, the City had never received an unsolicited request from a private individual to give a prayer at a council meeting. *Snyder IV*, Appendix at 3a-4a.

Mr. Snyder was offended by the City's tradition. The decision in *Whitehead* and the resumption of the tradition prompted Mr. Snyder to draft the following "prayer" and request permission to give it as the invocation to open a council meeting:

> OUR MOTHER, WHO ART IN HEAVEN (IF, INDEED THERE IS A HEAVEN AND IF THERE IS A GOD THAT TAKES A WOMAN'S FORM) HALLOWED BE THY NAME, WE ASK FOR THY BLESSING FOR AND GUIDANCE OF THOSE THAT WILL PARTICIPATE IN THIS MEETING AND FOR THOSE MORTALS THAT GOVERN THE STATE OF UTAH;
>
> WE FERVENTLY ASK THAT YOU GUIDE THE LEADERS OF THIS CITY, SALT LAKE COUNTY AND THE STATE OF UTAH SO THAT THEY MAY SEE THE WISDOM OF SEPARATING CHURCH AND STATE AND SO THAT THEY WILL NEVER AGAIN

PERFORM DEMEANING RELIGIOUS CEREMONIES AS PART OF OFFICIAL GOVERNMENT FUNCTIONS;

WE PRAY THAT YOU PREVENT SELF-RIGHTEOUS POLITICIANS FROM MIS-USING THE NAME OF GOD IN CONDUCTING GOVERNMENT MEETINGS; AND, THAT YOU LEAD THEM AWAY FROM THE HYPOCRITICAL AND BLASPHEMOUS DECEPTION OF THE PUBLIC, ATTEMPTING TO MAKE THE PEOPLE BELIEVE THAT BUREAUCRATS' DECISIONS AND ACTIONS HAVE THY STAMP OF APPROVAL IF PRAYERS ARE OFFERED AT THE BEGINNING OF GOVERNMENT MEETINGS;

WE ASK THAT YOU GRANT UTAH'S LEADERS AND POLITICIANS ENOUGH COURAGE AND DISCERNMENT TO UNDERSTAND THAT RELIGION IS A PRIVATE MATTER BETWEEN EVERY INDIVIDUAL AND HIS OR HER DEITY; WE BESEECH THEE TO EDUCATE GOVERNMENT LEADERS THAT RELIGIOUS BELIEFS SHOULD NOT BE BROADCAST AND REVEALED FOR THE PURPOSE OF IMPRESSING OTHERS; WE PRAY THAT YOU STRIKE DOWN THOSE THAT MIS-USE YOUR NAME AND THOSE THAT CHEAPEN

THE INSTITUTION OF PRAYER BY USING IT FOR THEIR OWN SELFISH POLITICAL GAINS;

WE ASK THAT THE PEOPLE OF UTAH WILL SOME DAY LEARN THE WISDOM OF THE SEPARATION OF CHURCH AND STATE; WE ASK THAT YOU WILL TEACH THE PEOPLE OF UTAH THAT GOVERNMENT SHOULD NOT PARTICIPATE IN RELIGION; WE PRAY THAT YOU SMITE THOSE GOVERNMENT OFFICIALS THAT WOULD ATTEMPT TO CENSOR OR CONTROL PRAYERS MADE BY ANYONE TO YOU OR TO ANY OTHER OF OUR GODS;

WE ASK THAT YOU DELIVER US FROM THE EVIL OF FORCED RELIGIOUS WORSHIP NOW SOUGHT TO BE IMPOSED UPON THE PEOPLE OF THE STATE OF UTAH BY THE ACTIONS OF MIS-GUIDED, WEAK AND STUPID POLITICIANS, WHO ABUSE POWER IN THEIR OWN SELF-RIGHTEOUSNESS;

ALL OF THIS WE ASK IN THY NAME AND IN THE NAME OF THY SON (IF IN FACT YOU HAD A SON THAT VISITED EARTH) FOR THE ETERNAL BETTERMENT OF ALL

OF US WHO POPULATE THE GREAT STATE OF UTAH.

AMEN.

Snyder IV, Appendix at 4a n.3.

The City's Attorney, defendant Hall, told Mr. Snyder the text of the proposed prayer was unacceptable and the City would not invite Mr. Snyder to give the prayer during the Opening Ceremony.[2] Mr. Snyder then filed this lawsuit. His claim was that "in branding his particular prayer 'unacceptable' and preventing him from offering it as part of the official 'reverence period' of the municipal council meeting, Murray City impermissibly preferred one religion over another." *Snyder IV*, Appendix at 7a-12a.

Mr. Snyder's lawsuit did not include a claim for violation of his rights under the Speech Clause of the First Amendment.

ARGUMENT WHY THE CASE SHOULD NOT BE REVIEWED BY THE COURT

There are no compelling reasons for the Court to grant the Petition for Writ of Certiorari. The Tenth Circuit Court of Appeals' decision is not in conflict with the decision of another

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[2] Mr. Hall informed Mr. Snyder he could give the "prayer" during the "public comment" portion of the meeting, which immediately followed the opening ceremony, or as an agenda item. Mr. Snyder chose neither alternative. *Snyder I*, Appendix at 57a-59a; *Snyder III*, Appendix at 91a.

United States court of appeals on the same matter. As discussed under I and II below, the Tenth Circuit Court of Appeals' *en banc* decision correctly applies precedent from this Court and otherwise does not depart from the accepted and usual course of judicial proceedings. Finally, as discussed under III below, the Tenth Circuit Court of Appeals' decision is not in conflict with a decision of the Utah Supreme Court.

I. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THE ISSUE IS GOVERNED BY *MARSH V. CHAMBERS*, 463 U.S. 783 (1983).

The manner in which the City carries out its tradition of having an Opening Ceremony is governed by *Marsh v. Chambers*, 463 U.S. 783 (1983), and does not violate the Establishment Clause. Prayers at the beginning of a legislative session are governmental expressions that constitutionally acknowledge the Country's religious heritage. These kinds of "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

Ceremonial prayers before legislative bodies are expressions by and on behalf of those bodies. In *Snyder IV* the Tenth Circuit Court of Appeals correctly interpreted *Marsh* as identifying a "genre" of legislative invocational prayer that "has become part of the fabric of our society" and constitutes a

"tolerable acknowledgment of beliefs widely held among the people." *Snyder IV*, Appendix at 17a-18a (quoting *Marsh*, 463 U.S. at 792). This Court identified boundaries of the genre beyond which the prayer becomes constitutionally intolerable: when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. Taking it one step further, this Court explained in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 603 (1989), that "not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." Thus, "the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it." *Snyder IV*, Appendix at 19a.

Legislative prayers cannot exist without the government selecting someone to offer them. *Marsh* must be read to mean the City does not violate the Establishment Clause by choosing who may offer the invocational prayer to open a council meeting. *Marsh* must also be read to mean the City does not violate the Establishment Clause by choosing not to invite someone to give an invocational prayer to open a City Council meeting after that person has announced his intention to give a prayer that is incompatible with the legitimate governmental purposes for having the tradition and falls outside the identified boundaries of the genre. Reserving time at the commencement of legislative

sessions for an Opening Ceremony, which includes lofty thoughts or prayers to encourage high-mindedness, solemnity and attention to agenda items, is constitutional under the Establishment Clause per *Marsh*. Declining one's request to give the Opening Ceremony in a fashion that is incompatible with the official purpose for reserving the constitutional practice is no more an endorsement of religion under the Establishment Clause than is having the practice itself. Here, there was incompatibility between the nature of the speech and the functioning of the "non-public forum," discussed below. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 808-09 (1985).

Implicit in *Marsh* is that the traditional Opening Ceremony is a non-public forum that is reserved for official government uses. There, "[t]he Nebraska Legislature beg[an] each of its sessions with a prayer offered by a chaplain who [was] chosen biennially by the Executive Board of the Legislative Council and [was] paid out of public funds." 463 U.S. at 784-85. A Presbyterian minister had served as chaplain since 1965 at a salary of $319.75 for each month the legislature was in session. His prayers were recorded in the Legislative Journal and collected from time to time in prayer books that were published at public expense. *See id.* A legislator challenged the practice on Establishment Clause grounds, claiming a violation because (1) a clergyman of the same denomination had been selected for 16 years, (2) he was paid with public funds, and (3) the prayers were in the Judeo-Christian tradition. *Id.* Conducting an extensive

review of the histories of the United States Congressional and Senatorial Chaplaincy practices and those of states and colonies, this Court held that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause. *Id.* The Court acknowledged that the United States Congress had, since the First Congress drafted the First Amendment almost 200 years before, opened sessions of Congress with prayer. *Id.* The Court explained that in light of history, this practice had become a part of the fabric of society, and that to invoke divine guidance on a public body entrusted with making the laws was not a violation of the Establishment Clause. *Id.* Rather, it was a tolerable acknowledgment of beliefs widely held among people of this Country.[3] *See id.* at 787-92. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the

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[3] In *Abington School District v. Schempp*, 374 U.S. 303, 303-04 (1963), the Court identified several references to the religious heritage of the Nation in many statutorily and officially sanctioned symbols, such as the national motto, "In God We Trust," which graces American currency, "One nation under God," as part of the Pledge of Allegiance to the American Flag, art galleries supported by public revenues which display centuries-old religious paintings that were inspired predominantly by one religious faith, and others. Even the United States Supreme Court Chambers "in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments." *Lynch v. Donnelly*, 465 U.S. 668, 676. *See also Marsh v. Chambers*, 463 U.S. 783, 786 (1983) ("In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court").

Establishment Clause arising from a practice of prayer similar to that now challenged."[4] *Id.* at 791.

Comparing the Nebraska Legislature's practice to that of the United States Congress, the Court concluded it would be incongruous to interpret the Establishment Clause as imposing more stringent First Amendment limits on the states than the draftsmen had imposed on the federal government. *See id.* at

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[4] In *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984), decided the year after *Marsh*, the Supreme Court explained:

> A significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Cause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In *Marsh v. Chambers*, 463 U.S. 783 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature.
>
> It is clear that neither the seventeen draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

793-95.[5] Moreover, the Court concluded that the Nebraska Legislature's longstanding practice of selecting the same Presbyterian minister, and even paying him at public expense, did not invalidate the practice. *See id.*

The purpose of the Nebraska's chaplaincy practice was, through traditional and ceremonial observance, to establish an appropriate mood for participants and to invoke divine guidance. By selecting the same minister year after year from a specific Christian denomination as the chaplain to pray before each legislative session, the Nebraska Legislature limited the diversity of expression that would occur in favor of a single mouthpiece. The United States Congress and Senate had similar practices in which the same Christian Chaplains served for extended periods of time, creating the same limitations of diversity. *See id.* at 793-94 & n.17.

In this case, rather than selecting and paying a single council chaplain to offer prayer at the beginning of each council meeting, Murray City's tradition was to select and invite participants from a number of religious and other groups and associations to provide the Opening Ceremony at no public expense. Following Mr. Snyder's argument to its logical end would result in an anomalous conclusion: using public monies to pay a chaplain from a single Christian denomination to pray at the

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[5] Some states chose a chaplain to serve for the entire legislative session. Other states selected different clergy to give the prayer each day, much like the City's tradition and practice. *See* 463 U.S. at 794 n.18.

beginning of legislative sessions is not offensive to the Establishment Clause, but inviting representatives from diverse groups over time to give the same Opening Ceremonial thought or prayer and achieve the same objective at no public expense is.[6]

Finally, tension exists between the Establishment and Free Speech Clauses. Avoiding an Establishment Clause violation is a legitimate state interest, in some circumstances, for limiting religious speech. This Court has recognized that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). Allowing Mr. Snyder to give his "prayer," which proselytized and disparaged others, and therefore was incompatible with the purpose for the non-public forum, would have violated the Establishment Clause. *See Snyder IV*, 19a, 22a. And, if not, allowing such proselytization and disparagement would have opened the forum from non-public to designated public, opening the forum to other than official government uses and making it indistinguishable from the other portions of the council meeting. See II, *infra*.

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[6] Granted, Murray City Council is not the United States Senate, the United States Supreme Court or the Tenth Circuit Court of Appeals. But it is a legislative body that governs pursuant to constitutional and statutory mandate. If certain traditions are recognized as constitutional at the highest and most visible levels of government, a local, less visible legislative body should be entitled to no lesser privileges under the same constitutional analysis.

II. MR. SNYDER'S CLAIM DOES NOT SOUND IN THE SPEECH CLAUSE. UNDER A FORUM ANALYSIS, HOWEVER, HIS CLAIM FAILS BECAUSE ALLOWING THE PRAYER WOULD HAVE EITHER VIOLATED THE ESTABLISHMENT CLAUSE OR OPENED THE FORUM FOR OTHER THAN OFFICIAL GOVERNMENT USES.

Mr. Snyder contends that the manner in which the City conducts its Opening Ceremony creates a "designated limited public forum" for the expression of religious ideas. Petition, pp. 8-10. Having so created the forum, he contends, the City was precluded under a strict scrutiny analysis from declining to invite him to give his "prayer" as the Opening Ceremony of the city council meeting. *See id.*

The three-part forum test identified in speech cases is not the appropriate analysis because Mr. Snyder made no speech claim. The test under *Marsh* provides the proper analysis. However, the City and Mr. Hall address the facts under the forum test because Mr. Snyder has used the speech analysis in his Establishment Clause claim by urging that the nature of the forum bears on the issue whether declining to invite Mr. Snyder to offer the invocation to open the city council meeting violated the Establishment Clause. In short, the Opening Ceremony was a non-public forum, and despite the protected character of Mr. Snyder's speech, the City properly declined to invite Mr. Snyder to pray because his proffered prayer proselytized, disparaged others, and fell outside the boundaries of the genre of acceptable legislative prayer. The government is justified in

reserving the forum as non-public for official government uses. Allowing the prayer would either have violated the Establishment Clause or changed the character of the forum, which the City was not required to allow.

The analysis Mr. Snyder advances was developed for assessment of claimed free speech violations. In cases involving governmental suppression of otherwise protected religious speech, the Establishment Clause analysis has generally been limited to whether the governmental entity's efforts to avoid an Establishment Clause violation constituted a legitimate reason to suppress the speech, and *not* whether the suppression itself violated the Establishment Clause. Courts have recognized that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

Capitol Square utilized an analysis similar to that Mr. Snyder advances, and precisely because plaintiff there had not alleged a speech violation, this Court refused to consider whether the City's disagreement with the Ku Klux Klan's political agenda was a basis for denying the request: "the . . . facts before [the Court] and the opinions below address[ed] only the Establishment Clause issue . . . ."[7] *Id.* at 760. There, the Court conducted an analysis similar to that in speech cases only because the nature of the forum was critical to assessing whether the state's allowing

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[7] Disagreement with the political agenda was not an element of the Establishment Clause Claim, but would have been an element of a Speech Clause claim.

the Ku Klux Klan to display its cross on government property would create an official endorsement of Christianity in violation of the Establishment Clause. Had the Square been a non-public forum, as is the Opening Ceremony at the city council meetings, instead of a public forum, allowing the display would likely have violated the Establishment Clause.[8]

Under this Court's three-part analysis for speech claims as well as the analysis of *Marsh*, declining Mr. Snyder's uninvited request to give his "prayer" during the Opening Ceremony did not violate the Establishment Clause:[9] (1) Was Mr. Snyder's proposed expression protected speech under the First Amendment? (2) if so, what was the nature of the forum in which Mr. Snyder sought to make the expression? (3) in light of the nature of the forum, by declining Mr. Snyder's request because it fell outside

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[8] Mr. Snyder's claim presents a slightly different question. Rather than assessing whether allowing his expression violates the Establishment Clause by endorsing religion as in *Capitol Square*, the question here is whether declining his request violated the Establishment Clause by disfavoring his "religion" or favoring other religions. To the extent allowing Mr. Snyder's request would have violated the Establishment Clause, a *Capitol Square* analysis applies.

[9] In *Capitol Square*, the Court first found that the religious display was private expression under the First Amendment and that religious expression was entitled to be as fully protected under the Free Speech Clause as is secular private expression. *See* 515 U.S. at 760-61. The Court found that the City's justification for excluding the unattended religious display was because its content was religious and it wanted to avoid official endorsement of Christianity, as required by the Establishment Clause. Although compliance with the Establishment Clause is considered a state interest sufficiently compelling to justify content-based restrictions on speech, the Court concluded that because of the nature of the forum—a traditional public forum—it was open to a broad spectrum of groups that would provide only incidental benefit to religion. *See id.* at 762-64.

the genre of acceptable legislative prayer, did the City violate the Establishment Clause? *See Capital Square*, 515 U.S. at 760-68.

The City concedes Mr. Snyder's proposed "prayer" was speech, including protest speech, entitled to protection by the Speech Clause. However, "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum . . . ." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Indeed, content-based discrimination is permissible in a non-public forum if it reserves the purpose of the forum. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995).

This Court has categorized government property into the three distinct fora: (1) traditional public forum; (2) designated public forum; and (3) non-public forum.

The first category—traditional public fora—consists of places such as "streets and parks, 'which have immemorially been held in trust for the use of the public, and, time out of hand, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[10] *Perry*

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[10] Under a speech analysis, in a traditional public forum content-based regulations are subject to heightened scrutiny, i.e., the government must show that the regulation is "necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Content-neutral regulations must be "narrowly tailored to serve a

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

This Court defined the second category—designated public forum—as property the government has opened for expressive activity, treating the property as if it were a traditional public forum. *See id.* at 45-46 & n.7. A designated public forum may be created for a "limited purpose" for use "by certain speakers, or for the discussion of certain subjects." *Id.* at 46 n.7. Unlike a traditional public forum, the government "is not required to indefinitely retain the open character" of a designated public forum.[11] *Id.* at 46.

This Court explained the third category—non-public forum—as "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." *Id.* The government may limit speech in a non-public forum to reserve the forum for the specific official uses to which it is lawfully dedicated.[12]

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significant government interest, and leave open ample alternative channels of communication." *Id.* (citing *United States Postal Serv. v. Council of Greenbaugh Civic Ass'ns*, 453 U.S. 114, 132 (1981)).

[11] Under a speech analysis, this Court explained that so long as the property is designated as a public forum, the government is "bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983). Thus, content-based regulations must be narrowly drawn to effectuate a compelling state interest and reasonable time, place, and manner regulations are permissible. *See id.*

[12] This Court explained the level of scrutiny, under a speech analysis, for regulating speech in non-public fora. Regulations of speech in a non-public forum are subject to the more deferential reasonableness standard. This does not

In this regard, the Court in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), gave additional guidance:

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." . . . In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . .[13]

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mean the government has unbridled control over speech, however, for it is axiomatic that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Thus, "[c]ontrol over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985).

[13] Once again, because Mr. Snyder has not alleged a speech claim, this Court should not consider whether the City disagreed with the expression as the basis for declining his request to give the Opening Ceremony of the City Council Meeting, as explained in *Capitol Square*, 515 U.S. at 559-60. Rather, the Court should consider only whether declining his request because it was incompatible with the reasons for having the Opening Ceremony violated the Establishment Clause. However, the City's conduct in declining to invite Mr. Snyder to give his "prayer" during the Opening Ceremony was solely to reserve the forum for

> As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Id. at 46 (quoting *United States Postal Service v . Greenburgh Civic Ass'n*, 453 U.S. 114, 129, 131 n.7 (1981), *Greer v. Spock*, 424 U.S. 828, 836 (1976), and *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

The Court in *Cornelius v. NAACP Legal Defense & Educational Fund. Inc.*, 473 U.S. 788 (1985), added:

> The Government's decision to restrict access to a non-public forum need only be reasonable; it need not be the most reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and functioning of the non-public forum is not mandated. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message. . . . Rarely will a non-public forum provide

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its intended purpose. Mr. Snyder was invited to give his "prayer" as an agenda item or during the public comment portion of the meeting.

> the only means of contact with a particular audience. Here . . . the speakers have access to alternative channels. . . .[14]

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[14] Here, Mr. Snyder had access to alternative channels. He was invited to give his "prayer" as an agenda item or during the public comment portion of the meeting. Significant disruption in the operation of government would otherwise ensue. For example:

> By selecting a chaplain or clergy person(s) from a single or limited number of Christian denominations, did the Nebraska Legislature, the United States Senate or the Congress create a forum, no longer restricted to official government uses, which requires them to allow any and all comers to express their offense to public prayer *during* the ceremony?
>
> Having a ceremonial recitation of the Pledge of Allegiance by participants at a city council meeting or a legislative session, which includes the language "One Nation under God," does a public body create a forum, no longer restricted to official government uses, requiring the body to allow anyone who desires to express his or her offense at such reference to deity *during* the ceremony?
>
> By gracing the United States Supreme Court chambers with a painting of Moses with the Ten Commandments, has the Court created a forum in which it must allow citizens to display any or all religious visual expressions they wish, including protest?
>
> By opening this Court with the invocation "God save the United States and this Honorable Court," does the United States Supreme Court create a forum for any Court observer or participant to interrupt, comment or replace the invocation with an objection to any reference to God?
>
> By inscribing United States currency with the Motto "In God We Trust," has the federal government created a forum in which citizens who object to such mingling of religious expression with the governmentally-created monetary system must be free to deface or replace the currency?

In each instance, the government has reserved and restricted the forum to official government uses, and has not opened the forum to protest religious speech. There are other readily available avenues for such expression. Particularly in the area of prayer before legislative bodies, there is little question

Id. at 808-09 (citing *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)).

The forum to which Mr. Snyder was denied participation was the Opening Ceremony of the City Council Meeting. *See Cornelius v. NAACP Legal Defense And Education, Inc.*, 473 U.S. 788 (1985) (forum analysis is not completed merely by identifying the government property at issue, but includes the access sought by the speaker; the relevant forum was the charitable drive rather than the federal workplace). The Murray City Council reserved the forum for the specific official uses to which it was lawfully dedicated. The Opening Ceremony was a non-public forum, reserved by the City for a specific, limited purpose, the same as the invocations in the Congress, Senate and Nebraska Legislature.[15]

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that invitees serve at the discretion of the legislative body for an official purpose and that such prayers are uttered in furtherance of official government business.

[15] In *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997) (Petition for Certiorari filed March 16, 1998 (No. 97-1535)), the court gave further analysis of non-public fora, as follows:

> Governmental intent is said to be the "touchstone" of forum analysis. . . . The government does not create a public forum "by inaction or by permitting limited discourse," . . . and when the state reserves property for its "specific official uses," it remains non-public in character . . . . [E]vidence that the government has created a forum to further efficiency and administrative convenience suggests that the forum is non-public. . . . It is also well established that the presence of some expressive activity in the forum does not, without more, render it a public forum.

The City's decision to restrict Mr. Snyder's access to the Opening Ceremony by declining to invite him to give his prayer was reasonable. As discussed under Part I above, there was strict incompatibility between the nature of Mr. Snyder's proposed speech and the proper functioning of the non-public forum even though a strict incompatibility was not required. Inviting Mr. Snyder to give a prayer that proselytized and disparaged and therefore exceeded the boundaries of appropriate legislative prayer would have violated the Establishment Clause or resulted in the loss of reservation of the Opening Ceremony for official government uses.

III. *SNYDER IV* IS NOT IN CONFLICT WITH THE UTAH SUPREME COURT'S DECISION IN *SOCIETY OF SEPARATIONISTS, INC. V. WHITEHEAD*, 870 P.2D 916 (UTAH 1993).

Snyder IV does not conflict with the Utah Supreme Court's decision in *Whitehead*. The Society of Separationists did not include a claim under the Establishment Clause of the First Amendment to the United States Constitution. Rather, the Society of Separationists focused solely on the religion clause of the Utah Constitution which provides, in part:

Id. at 279 (quoting and citing, among others, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992), *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992), *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985), *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995), and *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)).

> [1] There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. [2] No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Const. art. I, § 4. The Utah Supreme Court was not bound to use an analysis under *Marsh* or *Lemon v. Kurtzman*, 403 U.S. 607 (1971), because no federal Establishment Clause issue was presented, and the language of the religion clause of the Utah Constitution differs markedly from that of the Establishment Clause. The Court explained:

> While we agree that the *Marsh* decision might control here if the Council's practice were being challenged as a violation of the federal constitution, it does not control our analysis under the Utah Constitution, with its broader and more detailed prohibitions.

Whitehead, 870 P.2d at 930.

> The City Council . . . urges upon us the United States Supreme Court's precedent in the area of legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 . . . (1983), or the Court's analytical framework developed in *Lemon v. Kurtzman*, 403 U.S. 602 . . . (1971).

> . . . The federal rulings set the floor for federal constitutional protections which we must respect in interpreting the scope of our own constitution's provision. But the federal courts have an entirely different task before them than do we. They have only a cryptic sentence to interpret; we have paragraphs that are expressed in clearer terms and that are given even more vivid meaning by our unique and relatively recent history. The citizens of Utah know, perhaps better than those of any other state, what evils can befall people, communities, and government when religious strife is pervasive.

Whitehead, 870 P.2d at 940.

Addressing the Separationists' claim that invocational prayers to open City Council meetings appropriated public money and property for religious worship in violation of the second part of the religion clause quoted above, the Utah Supreme Court used a two-step analysis of constitutional neutrality. *See id.* at 938-39. The Court derived the analysis by examining precedent from other jurisdictions and Utah's unusual history. *Id.* The analysis was that use of public money or property that benefits religious worship, exercise, or instruction or any ecclesiastical establishment qualifies as an indirect benefit and survives state constitutional scrutiny only if it meets two requirements. First, the money or property must be provided on a nondiscriminatory basis. Second, the public money or property must be equally accessible to all. *Id.* The Utah Supreme Court held:

> First, we conclude that the expenditures made in connection with the arrangement for and provision of facilities for opening remarks were provided on a nondiscriminatory basis. The expenditures were not for the religious exercise itself, but for the meeting and that portion of the agenda that consists of generic opening thoughts, some of which may include prayers. Furthermore, the Separationists have not shown that the City Council favored particular religions or religion in general in scheduling participants. To the contrary, the record indicates that the City Council made efforts to assure that a broad cross-section of the community was represented. We conclude that any use of public money or property for facilitating the giving of opening remarks was made on a nondiscriminatory basis without regard to the belief systems of the speakers. Second, the Separationists have not shown that the City Council's policy denied any group or individual a realistically equal opportunity to participate in favor of particular religious groups or speakers or of religious speakers in general. In fact, the record shows that the resource here is not one that had to be allocated; there were more opportunities in the schedule for participants to give opening remarks than there were interested speakers.

Id. at 938-39.

Addressing the Separationist's claim that the language in the Utah Constitution "[t]here shall be no union of Church and state, nor shall any church, dominate the state or interfere with its functions," requires an absolute separation of church and state, the Court explained:

> Rather, the language is a particularistic command directed at the Mormon Church as an institution and was intended to forever bar the sort of theocracy that existed in the early days of the State of Deseret by preventing that church, or any other church as an institution, from "interfer[ing]" directly in or "dominat[ing]" state government. Based on this reading, we conclude that the union-of-church-and-state ban applies only to circumstances that join a particular religious denomination and the state so that the two function in tandem on an ongoing basis. There is no evidence in the record to support a claim that such a union exists or, alternatively, that the City Council's policy could be construed as allowing one religious denomination to dominate or interfere with city business. In fact, the record indicates no preference by the City Council for any religious group or for organized religion in general. Quite the contrary, a wide variety of religious groups, as well as some secular ones, have been represented in the opening ceremony.

Id. at 939.

Finally, the Utah Supreme Court's concluding comments unify that court's thinking with precedent from this Court by identifying a parallel between origins of the Country and of the State of Utah:

> On a deeper level, we do not agree with the Separationists that the framers of the Utah Constitution intended a complete separation between religion and the state, if complete separation means positive hostility as the Separationists seem to contend. . . . Such a complete separation in "every and all respects" would make the state and religion "aliens to each other—hostile, suspicious, and even unfriendly." . . . Such a result is clearly unnecessary to the goals of our state and federal constitutions and . . . is one that would produce consequences unintended by the framers and unheralded by our history. . . . This is a state, after all, that was settled by people with primarily religious motivations. Our early history is of the struggle between those with deeply held views on matters of conscience, whether grounded in orthodox religion or otherwise. The state that was created by the parties to this struggle plainly was not intended to be hostile to the foundation upon which most of its creators grounded their value systems—religion.

Id. at 939-40 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (Douglas, J.).[16]

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[16] This Court explained:

> It has never been thought either possible or desirable to enforce a regime of total separation [between church and state], and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court.

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973). The Court also explained in *Lee v. Weismann*, 505 U.S. 577, 598 (1992), that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Indeed,

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Abington School Dist. v. Schempp, 374 U.S. 303, 308 (1963) (Goldberg, J., concurring).

This Court has refused "to take a rigid, absolutist view of the Establishment Clause. We have refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.'" *Lynch*, 465 U.S. at 678 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970)). That objective, as quoted by the Court, "was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." *Id.* (quoting Joseph Story at 3 Story, Commentaries on the Constitution of the United States 728 (1833)). The "inquiry calls for line drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not write a statute.'" *Id.* (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Id. at 678-79 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

Where the Society of Separationists did not invoke the Establishment Clause and the Religion Clause of the Utah Constitution differs markedly from the Establishment Clause, *Snyder IV* is not inconsistent with the Utah Supreme Court's decision in *Whitehead*.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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